

# EXHIBIT

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65VVVILH

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

05 CR 621 (KMK)

5 ALBERTO VILAR,  
6 GARY TANAKA

SUPPRESSION HEARING

Defendants.

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7  
8 New York, N.Y.  
9 May 31, 2006  
10 10:05 a.m.

11 Before:

12 HON. KENNETH M. KARAS,

13 District Judge

14 APPEARANCES

15 MICHAEL J. GARCIA  
16 United States Attorney for the  
17 Southern District of New York  
18 DEIRDRE McEVOY  
19 MARC LITT  
20 Assistant United States Attorneys

21 HOFFMAN & POLLOK  
22 Attorneys for Defendant Alberto Vilar  
23 JEFFREY C. HOFFMAN  
24 SUSAN C. WOLFE

Attorneys for Defendant Gary Tanaka:

25 WILSON SONSINI GOODRICH & ROSATI  
GLENN CHARLES COLTON  
-AND-

KOBRE & KIM  
STEVEN GARY KOBRE

65VVVILH

Litt - direct

1 couldn't instruct him to tell his employees what to do or what  
2 not to do. But that at this point the government would prefer  
3 if they did not have contact with Mr. Vilar.

4 And I should back up, because I recall one other part  
5 of our first conversation that I distinctly recall. And that  
6 is, Mr. Licker indicating to me that he wanted to be  
7 cooperative with the government; and he also in that first  
8 call, after saying that, he mentioned to me that in other  
9 cases, he had sometimes put into place a procedure to prevent  
10 documents from being destroyed, and things of that nature. And  
11 he asked me -- or sort of a document retention policy. And  
12 asked whether the government would like him to do so in this  
13 case. And I told him that I thought that would be a good idea.  
14 Q. What, if any, other subjects do you recall discussing with  
15 Mr. Licker during one of those two morning calls?

16 A. During one of those two morning calls, Mr. Licker asked me  
17 whether the government intended to serve Amerindo with a grand  
18 jury subpoena.

19 Q. How did you respond to Mr. Licker's question about whether  
20 the government intended to serve Amerindo with the grand jury  
21 subpoena?

22 A. I responded that I didn't know, and that I'd have to get  
23 back to him.

24 Q. Who first raised the issue of a grand jury subpoena?

25 A. Mr. Licker.

65VVVILH

Litt - direct

1 Q. At that point of that conversation, had a grand jury  
2 subpoena been issued?

3 A. No.

4 Q. Before that phone call with Mr. Licker, had you discussed  
5 the possibility of issuing a grand jury subpoena with anyone?

6 A. No.

7 Q. Prior to the phone call of Mr. Licker, had you considered  
8 issuing a grand jury subpoena to Amerindo?

9 A. No.

10 Q. After that phone call with Mr. Licker, who, if anyone, did  
11 you consult with about whether to issue a grand jury subpoena?

12 A. I consulted with the supervisor in the securities and  
13 commodities fraud unit.

14 Q. And who was that?

15 A. David Esseks, E-s-s-e-k-s.

16 Q. What, if anything, did you discuss with Mr. Esseks about  
17 the subject of a grand jury subpoena?

18 A. I told Mr. Esseks the substance of the phone call with  
19 Mr. Licker; that Mr. Licker had raised that question. And I  
20 asked him whether he thought that was a good idea or not.

21 Q. When you say "a good idea," what was a good idea?

22 A. To issue a grand jury subpoena.

23 Q. And what was his response with respect to your question  
24 about whether it was a good idea to issue a grand jury  
25 subpoena?

65VVVILH

Litt - direct

1 one of the postal inspectors.

2 Q. After the subpoena was served, do you recall the substance  
3 of any particular conversation you had with Mr. Licker?

4 A. I do.

5 Q. Approximately what time do you recall that conversation  
6 happening?

7 A. Sometime in the afternoon or early evening of May 26.

8 Q. What is your recollection about the timing of the  
9 conversation based on?

10 A. My recollection of the timing is based on the substance of  
11 the communication, and my review of the phone records.

12 Q. And did --

13 MR. COLTON: Your Honor, I'd like to just interrupt  
14 for a second here. And I think I foresee what's about to  
15 happen.

16 And if he's going to testify as to an agent handing  
17 him a phone about a call -- or an agent handing somebody --  
18 Mr. Licker a cell phone, and if that agent is going to  
19 miraculously be Agent Fraterrigo, which is going to be a call  
20 that isn't on the cell phone records that's going to be highly  
21 in dispute, the representation that nothing he has to say would  
22 be relevant to her testimony would now have changed.

23 So before we get into that, I think we can perhaps  
24 have a sidebar or try to figure out what the testimony is going  
25 to be, and get a proffer from Ms. McEvoy for a mystery call

65VVVILH

Litt - direct

1 that we never heard about that may very well involve this  
2 witness sitting here comes out.

3 THE COURT: Aren't all the calls mystery calls at this  
4 point? Isn't that the point of the hearing, we're finding out  
5 for the first time who made what calls when, to whom, and what  
6 they said? I'm not sure it's fair to -- sort of devious about  
7 mystery calls. I mean we're all learning about this, at least  
8 I am.

9 So is your concern that Inspector Fraterrigo -- is  
10 this the same thing, that she shouldn't be here?

11 MR. COLTON: Exactly. Yes.

12 THE COURT: Well, I still don't know what you do with  
13 Rule 615. You get to cross her on this if it comes up in her  
14 testimony.

15 MR. COLTON: Okay.

16 THE COURT: And she's allowed to be here as the case  
17 agent. I mean I just think we've been over this.

18 MR. COLTON: Okay.

19 THE COURT: Go ahead, Ms. McEvoy.

20 BY MS. MCEVOY:

21 Q. During the conversation that you recalled having with  
22 Mr. Licker after you served the subpoena, what do you recall  
23 Mr. Licker saying to you and what do you recall you saying to  
24 him?

25 A. I recall Mr. Licker saying to me that it had been a long

65VVVILH

Litt - direct

1 day; that he was tired; that either used the words his people  
2 were tired, Amerindo employees were tired and wanted to go  
3 home. He indicated that there was a lot of work left to be  
4 done with the search.

5 He indicated or reminded me that he had done two  
6 things, accepted service of the grand jury subpoena, and had  
7 agreed to put in place some kind of document, preservation  
8 policy, and he had done that; and that he wanted to cooperate  
9 with the government.

10 And he suggested that instead of the postal inspectors  
11 and him and whoever else spending the foreseeable future of  
12 that evening continuing the search, that rather than do that,  
13 the company would produce documents pursuant to the grand jury  
14 subpoena.

15 Q. Did you agree to Mr. Licker's suggestion right after he  
16 made it during that phone call?

17 A. No, I did not.

18 Q. What do you recall doing after Mr. Licker made that  
19 suggestion?

20 A. I recall wanting to speak to one of the postal inspectors.  
21 And I asked Mr. Licker to hand the phone to one of them.

22 Q. Do you recall who you spoke to?

23 A. I don't.

24 Q. What, if anything, did you communicate to the postal  
25 inspector about the proposal?

65VVVILH

Litt - direct

1 A. I tried to communicate the substance of it, a summary of  
2 what I just said: That Mr. Licker said everyone was tired and  
3 wanted to go home, and there was a lot of work left to be done;  
4 and his offer to complete the process through the grand jury  
5 subpoena rather than through the search.

6 And there's one other thing that I recall that he said  
7 to me, which was that it would be more efficient -- was another  
8 thing that he said to me, that it would be more efficient and  
9 we wouldn't -- and less disruptive to Amerindo's business to  
10 proceed in that way. And that if we proceeded by government  
11 subpoena, the government would get what it really wanted I  
12 believe is the phrase that he used, instead of having to take  
13 so much material.

14 Q. Do you recall the postal inspector's response?

15 A. Not specifically, no.

16 Q. What, if anything, did you communicate with Mr. Licker  
17 about whether you agreed to his suggestion?

18 A. I don't recall whether I spoke to Mr. Licker again that  
19 day.

20 Q. And what, if any, instructions do you recall giving the  
21 postal inspectors about terminating the search?

22 A. I don't recall.

23 Q. Do you know if the postal inspectors terminated the search  
24 nearly after the conversation you had with Mr. Licker about  
25 terminating the search in lieu of the grand jury subpoena?